Filed 7/12/19 P. v. Contaxis CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. APRIL LYNN CONTAXIS, Defendant and Appellant.	A151406 (Contra Costa County Super. Ct. No. 05-161838-8)

Defendant April Lynn Contaxis was convicted following a jury trial of two counts of driving under the influence of alcohol (DUI) causing bodily injury to another person. On appeal, she contends the trial court improperly allowed a law enforcement officer to testify as an expert on the cause of the vehicle accident. She also raises evidentiary challenges related to the "illegal act" element of the charged offenses. We affirm the conviction but remand for the trial court to impose sentence and correct sentencing errors identified herein.

FACTUAL AND PROCEDURAL BACKGROUND

On October 23, 2015, at around 11:30 p.m., defendant's SUV collided with a tree. She had been driving on a residential street with a posted speed limit of 25 miles per hour. The street was dark, with the only illumination coming from a light on a neighbor's house. The front of the vehicle was crushed, both front airbags had deployed, and the front doors were difficult to open. Just before the collision, a neighbor heard a vehicle accelerating up the road without stopping at a nearby stop sign before hearing a "pretty loud crash." The neighbor's roommate later testified the vehicle sounded like it was on

the freeway and "was going much faster than any vehicle [she] had ever heard on that road before." Another neighbor testified that the impact of the crash caused his house to shake so much that he thought an earthquake had occurred.

In November 2016, an information was filed charging defendant with DUI causing injury to another person (Veh. Code,[1] § 23153, subd. (a); count 1), and driving with a blood-alcohol content of .08 percent or more, causing injury to another person (§ 23153, subd. (b); count 2). The information further alleged that defendant's blood-alcohol content was 0.15 percent or higher (§ 23578).

The following facts were adduced at trial. Contra Costa County Sheriff's Deputy Allison Kotchevar responded to the accident and found defendant sitting down leaning against the driver's side door of the damaged SUV. Defendant's boyfriend, Brian Smith, was on his back near the rear bumper screaming in pain. Smith told the officer defendant was the driver and they had been drinking. Smith suffered a dislocated and fractured shoulder that required surgery. A paramedic who transported defendant to the hospital heard defendant say, "I had been drinking. I'm sorry." The paramedic observed deformities on both of defendant's legs and believed she had lost between one and two liters of blood. He noticed a strong odor of alcohol.

Smith and defendant had joined friends at around 5:30 p.m. for food and drinks at a restaurant. Smith bought defendant an individual-sized bottle of pink wine. Defendant had also consumed two beers at the restaurant. The group left to watch a high school football game. After 10:00 p.m., a friend drove them to a bar where everyone drank more alcoholic beverages. Smith did not notice defendant drinking there, but defendant later told an officer she had consumed two or three more cups of wine at the bar. A friend drove them from the bar to the restaurant to retrieve defendant's car. Defendant then drove toward her home in Orinda with Smith in the passenger seat. Prior to the accident, Smith did not notice any erratic driving and he did not think defendant was intoxicated.

[1] All further statutory references are to the Vehicle Code except as otherwise indicated.

Following the crash, defendant was interviewed by an officer at the hospital. She had just gotten out of surgery and appeared to be in pain and drowsy. The officer did not know what pain medication she had been given. Defendant could not remember anything about the accident but was able to describe the hours prior to the accident, including the beverages she had consumed. She told the officer that the vehicle did not have any mechanical problems.

The People introduced a trauma chem panel blood test conducted by the hospital. This type of test is not designed to be used in court to prove that a person has been driving under the influence. The results of defendant's trauma chem panel showed a blood-alcohol level of 0.242 percent. On cross-examination, the lab technician who tested the blood acknowledged he was not aware of substances that could cause the test to produce a false positive. The hospital's lab manager stated that lactic acid, which is produced by muscle injuries, can affect the results of the test. A lactic acid test had been ordered but not performed on defendant.

The jury convicted defendant of both DUI counts but was unable to reach a verdict on the special allegation that defendant's blood-alcohol content exceeded 0.15 percent. At sentencing, the trial court suspended imposition of sentence and placed defendant on formal probation for three years with various terms and conditions. This appeal followed.

DISCUSSION

I. Expert Witness Testimony

Defendant contends that the trial court abused its discretion by allowing Deputy Kotchevar to testify as an expert on the cause of the traffic collision in this case. According to defendant, Deputy Kotchevar did not have the requisite expertise to testify about the cause of the accident, and this error requires reversal because the expert testimony was the primary evidence that led to conviction. We are unpersuaded.

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge,

skill, experience, training, or education must be shown before the witness may testify as an expert." (Evid. Code, § 720, subd. (a).) Such expertise may be shown "by any otherwise admissible evidence, including his own testimony." (*Id.*, subd. (b).) An expert may offer opinion testimony if the subject is sufficiently beyond common experience that it would assist the trier of fact. (*Id.*, § 801, subd. (a).) The opinion must be based on matter perceived by, or personally known, or made known to the witness at or before the hearing that is of the type that reasonably may be relied upon in forming an opinion on the subject to which the expert's testimony relates. (*Id.*, § 801, subd. (b).) On direct examination, an expert may state the reasons for his or her opinion and the matter upon which the opinion is based. (*Id.*, § 802; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 651, disapproved on another ground by *People v. Vang* (2011) 52 Cal.4th 1038, 1047–1048, fn. 3.) " 'The trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion [is] shown. [Citations.]' [Citation.] This court may find error only if the witness '*clearly lacks* qualification as an expert.' " (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1377 [upholding the admission of officers' opinions that the accidents in question were purposely staged to perpetuate insurance fraud].)

Deputy Kotchevar testified she had been a deputy sheriff for four and a half years at the time of the trial. She received training on DUI investigations, including a 40-hour course on how to recognize driver intoxication and conduct field sobriety tests. Prior to defendant's collision, Deputy Kotchevar had conducted three or four full DUI investigations in the field. She also received eight hours of training in traffic investigation and traffic reconstruction, and had investigated two or three traffic collisions and determined the causes of the collisions. On voir dire, Deputy Kotchevar acknowledged she did not have a degree in physics or an advanced degree in traffic reconstruction and was testifying for the first time about a traffic collision. Over defense counsel's objection, the trial court allowed Deputy Kotchevar to offer her opinion about the cause of defendant's traffic collision. The court added, "[Her] relevant inexperience goes to the weight given to her opinion."

Deputy Kotchevar opined that speeding was a cause of the collision. She based her opinion on information she received from neighbors, the absence of skid marks on the road, and the significant damage to the car, all of which suggested the driver had exceeded the 25 mile per hour speed limit. She also concluded driving under the influence and failing to maintain the lane per section 21658 were causes of the collision.

Defendant contends Deputy Kotchevar was not qualified to render her opinion as to the cause of the collision because she lacks extensive training in accident reconstruction. Defendant notes that Deputy Kotchevar did not conduct any tests, did not check if the vehicle brakes were functioning, and had no way of knowing what caused the vehicle to leave the lane or whether it actually ran the stop sign. However, defendant offers no authority for the proposition that a law enforcement officer is unqualified to provide expert testimony on the cause of a traffic accident without holding an advanced degree in physics or resorting to complex measurements and mathematical equations. On the contrary, "[i]t is generally established that traffic officers whose duties include investigations of automobile accidents are qualified experts and may properly testify concerning their opinions as to the various factors involved in such accidents, based upon their own observations." (*Hart v. Wielt* (1970) 4 Cal.App.3d 224, 229 [reasonable rate of speed for the conditions]; see *People v. Haeussler* (1953) 41 Cal.2d 252, 260 [point of impact between vehicles]; *Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1616 [causation].) "[T]he determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth, and 'no hard and fast rule can be laid down which would be applicable in every circumstance.' [Citation.] Where a witness has disclosed sufficient knowledge, the question of the degree of knowledge goes more to the weight of the evidence than its admissibility." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 38.)

We are hard pressed to find a manifest abuse of discretion. Although Deputy Kotchevar was not an expert in the field of accident reconstruction, she was qualified to render an opinion about the cause of the collision based on her training and experience and her investigation of the accident. Her opinions were grounded in what she observed

and learned at the accident site. In the trial court's view, Deputy Kotchevar's general opinion that defendant was speeding was appropriate based on the deputy's relative knowledge of traffic collisions, which was "certainly greater than an ordinary person." To the extent her opinions may have reached the limits of her expertise, it was defense counsel's job to point that out on cross-examination, which he ably did. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1229.)

In any event, there was overwhelming evidence, apart from the deputy's testimony, that the collision involved speeding, negligently leaving the traffic lane, and driving under the influence. Deputy Kotchevar's opinions were corroborated by the physical evidence at the scene and the damage to the vehicle, the neighbor's accounts of the vehicle's speed, as well as defendant's own statements. The deputy's opinions, although relevant, were cumulative of the other evidence in the case. Any error in admitting Deputy Kotchevar's testimony as an expert was harmless because it is not reasonably probable defendant would have achieved a more favorable verdict in the absence of the challenged testimony. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II. Element of Underlying Illegal Act

Defendant contends her conviction must be reversed because the prosecutor presented an invalid legal theory to satisfy the element that she had committed an illegal act while driving under the influence. Defendant is incorrect.

Defendant was convicted under counts 1 and 2 of DUI causing injury (§ 23153, subd. (a)), and driving with an excessive blood-alcohol level causing injury (*id.*, subd. (b)), respectively. "The elements necessary for conviction are as follows — for . . . section 23153, subdivision (a), the prosecutor must prove: ' "(1) driving a vehicle while under the influence of an alcoholic beverage or drug; (2) when so driving, committing some act which violates the law or is a failure to perform some duty required by law; and (3) as a proximate result of such violation of law or failure to perform a duty, another person was injured. [Citation.] [S]ection 23153, subdivision (b), has the same elements except the first element is expressed as driving a vehicle 'while having 0.08 percent or more, by weight, of alcohol in his or her blood . . . .' [Citation.] To satisfy the second

element, the evidence must show an unlawful act or neglect of duty *in addition* to driving under the influence." ' " (*People v. Givan* (2015) 233 Cal.App.4th 335, 349.)

When a charge is based on the defendant doing an act forbidden by law, the court must instruct the jury of the forbidden act. (*People v. Ellis* (1999) 69 Cal.App.4th 1334, 1338.) Here, the trial court instructed that the People alleged defendant had committed the following illegal acts to satisfy the illegal act requirement of section 23153: "One, failure to stop at a stop sign in violation of . . . [section] 22450[, subdivision] (a); two, failure to maintain lanes in violation of . . . [section] 21658; three, driving at an unsafe speed in violation of . . . [section] 22350[, subdivision] (a)." The court instructed that all jurors must agree that defendant committed at least one illegal act to find her guilty.

The jury was also instructed on the statutory definition of failure to maintain lanes under section 21658, subdivision (a): "[W]henever any roadway has been divided into two or more clearly marked lanes for traffic *in one direction,* the following rules apply: [¶] . . . [a] vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from the lane until such movement can be made with reasonable safety." (Italics added.) Defendant correctly contends that this statute should not apply because section 21658 only prohibits unsafe lane changes where a road has multiple lanes traveling in the same direction. In the present case, the road on which the accident occurred is a two-lane roadway, with each lane designated to traffic in *opposing* directions.

Defendant contends on appeal that the jury was never given the actual language of section 21658 and therefore had no way to determine that her conduct did not actually violate the statute. That is incorrect, since, as discussed above, the jury was specifically instructed on the language of section 21658, subdivision (a). Accordingly, while she asserts the prosecution's legal theory was "legally invalid," the error involves the presentation of a factually invalid theory.

"When an appellate court determines that a trial court has presented a jury with two theories supporting a conviction—one *legally* valid and one *legally* invalid—the conviction must be reversed 'absent a basis in the record to find that the verdict was

actually based on valid ground.' [Citation.] That basis exists only when the jury has '*actually*' relied upon the valid theory [citations]; absent such proof, the conviction must be overturned—even if the evidence supporting the valid theory was overwhelming [citation]. By contrast, when an appellate court determines that a trial court has presented a jury with two legally valid theories supporting a conviction—one *factually* valid (because it is supported by sufficient evidence) and one *factually* invalid (because it is not)—the conviction must be affirmed unless the 'record affirmatively demonstrates . . . that the jury did in fact rely on the [factually] unsupported ground.' [Citation.] These different tests reflect the view that jurors are 'well equipped' to sort *factually* valid from invalid theories, but ill equipped to sort *legally* valid from invalid theories." (*People v. Aledamat* (2018) 20 Cal.App.5th 1149, 1153–1154.)

We agree with defendant that the evidence does not support a failure to maintain a traffic lane in violation of section 21658. That does not mean, however, that the jury was presented with a legally invalid theory. An invalid legal theory involves an incorrect statement of law. An invalid factual theory involves a legally correct statement of law, but one which does not apply to the case as it is not supported by the evidence. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1125, citing *Griffin v. United States* (1991) 502 U.S. 46, 59.) Factual inadequacy is a question for the jury to decide. (*Guiton*, at p. 1129.) While an instruction on a legally invalid theory generally requires reversal, an instruction on a factually invalid theory requires reversal only if it is reasonably probable that the jury's conviction is based *solely* on that theory. (*Guiton*, at p. 1130.) Here, the evidence was insufficient to support a crossing-lanes violation under 21658, but, as discussed above, the evidence supporting a finding of guilt on two other valid legal theories—speeding and running a stop sign—was substantial. Because the jury was well equipped to determine the facts supporting the alternate theories presented and to reject the factually invalid theory, any error was harmless.

III. Remand Is Necessary for Imposition of Sentence

Defendant raises various challenges to the conditions of probation and imposed fines. She claims that (1) the trial court erred in imposing 400 days in custody as a term

of probation, (2) the court imposed a probation revocation restitution fine in an unauthorized amount, (3) the court imposed a DUI base fine in an unauthorized amount, and (4) the court improperly revoked her driver's license for three years. The Attorney General concedes the trial court was required to, but did not, impose sentence under section 23600, subdivision (a), and on remand may correct other sentencing errors identified herein.

Although defendant did not raise her challenges below, "a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) "[T]he 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal." (*Ibid*.) Review is not foreclosed due to lack of objection, because "obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable." (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

Conviction of a first violation of DUI causing injury to another person (section 23153) is punishable by imprisonment in the county jail for 90 days to one year and by a fine of $390 to $1,000.[2] The defendant may be placed on probation, but if probation is ordered, the terms and conditions must include confinement in the county jail for at least five days but not more than one year, and payment of a fine between $390 and $1,000. (§ 23556, subd. (a)(1).) Imposition of probation also requires that the defendant's driver's license be suspended and the defendant ordered to participate in and successfully

[2] Section 23554 provides: "If any person is convicted of a first violation of Section 23153, that person shall be punished by imprisonment in the state prison, or in a county jail for not less than 90 days nor more than one year, and by a fine of not less than three hundred ninety dollars ($390) nor more than one thousand dollars ($1,000). The person's privilege to operate a motor vehicle shall be suspended by the Department of Motor Vehicles pursuant to paragraph (2) of subdivision (a) of Section 13352. The court shall require the person to surrender the driver's license to the court in accordance with Section 13550.

complete an alcohol abuse counseling program as conditions of probation. (§ 23556, subds. (a)(2), (b)(2).) Here, the trial court improperly imposed 400 days in custody as a condition of probation, in excess of the statutory maximum of one year.

Penal Code section 1202.44 provides: "In every case in which a person is convicted of a crime and a conditional sentence or a sentence that includes a period of probation is imposed, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of [Penal Code] section 1202.4, assess an additional probation revocation restitution fine in the *same amount* as that imposed pursuant to subdivision (b) of Section 1202.4." The trial court imposed a restitution fine of $300 pursuant to Penal Code section 1202.4, subdivision (b)(1), along with a probation revocation fine of $560.

In addition, the maximum base fine for a first-time offender of section 23153 who is placed on probation is $1,000.[3] (§ 23556, subd. (a)(1).) The trial court exceeded the maximum by imposing a base fine of $2,200. The Attorney General correctly notes that defendant's two convictions under section 23153 arose from the same acts, and therefore the trial court must sentence defendant as a first-time offender. (See *People v. Snook* (1997) 16 Cal.4th 1210, 1216.) Finally, defendant's conviction under section 23153 requires that the Department of Motor Vehicles, not the trial court, suspend defendant's driving privileges for a period of one year only. (§§ 23554, 13552, subd. (a).)

DISPOSITION

The case is remanded for imposition of sentence in a manner consistent with this opinion. In all other respects, the judgment is affirmed. Our order shall have no impact on the obligation of the Department of Motor Vehicles to take appropriate action to suspend or revoke defendant's driving privileges as required by law as a consequence of her conviction.

[3] Defendant was previously charged with two misdemeanor violations of section 23152 in 1991. To be a second-time offender, a person must be convicted of a violation of section 23152 within 10 years of a separate violation of section 23153. (§ 23560.)

_____
Sanchez, J.

WE CONCUR:

_____
Humes, P. J.

_____
Banke, J.